## DISTRICT COURT OF THE UNITED STATES.

(Eastern District of Virginia.)

UNITED STATES v. GOLDSTEIN.*

1. CONTEMPT—*Not purged by offer to testify.* An offer to testify after refusal to do so before Referee in Bankruptcy does not purge the contempt; but (it seems) is rather an admission that the defendant could have answered the questions without danger.
2. CONTEMPT—*Advice of counsel.* Counsel's advice to his client not to testify palliates, but does not excuse contempt.
3. CONTEMPT—*Constitutional privilege—What essential in statute to negative the application thereof—Sec. 7, cl. 9 of the Bankruptcy Act does not grant complete immunity.* In order to deprive a witness of his constitutional right to refuse to give testimony that might incriminate himself, a statute must afford him *complete immunity*, and there must be an *absolute wiping out of the offence as to him.* The immunity afforded by sec. 7, cl. 9, of the Bankruptcy Act is not sufficient, as it only guarantees that the bankrupt's testimony shall not be offered in evidence in a criminal proceeding.
4. CONTEMPT—*Constitutional privilege.* Filing a voluntary petition in bankruptcy is not a final and irrevocable waiver of the constitutional privilege.
5. CONTEMPT—*Test for in regard to constitutional privilege.* In deciding whether or not there was contempt, the test is, "Might an answer to the question have a tendency to criminate the witness?"
6. BANKRUPTCY ACT—*Sec. 29b, cls. 1 and 2 construed—Concealment of property from trustee.* Concealment of property after the adjudication, even though before the appointment of the trustee, is a concealment from the trustee.

On a rule for contempt.

The opinion states the case.

*Jas. E. Edmunds, Whitehead & Whitehead, F. W. Whitaker,* and *H. M. Ford,* for the creditors.

*Jno. G. Haythe,* for the respondent.

McDOWELL, J.:

On May 16, 1904, the defendant here filed his voluntary petition in bankruptcy. As the judge was then absent from the district, the clerk of the court made the order of reference and the

* Reported by C. B. Garnett.

referee made the order of adjudication on May 17, 1904. On May 26th, upon an affidavit that the bankrupt was concealing and removing his property, the referee appointed a receiver and directed him to take possession of the property. On June 8th a trustee was appointed. At the first meeting of creditors, held on June 8th, the bankrupt was partially examined. The bankrupt is a foreigner, recently landed in this country, ignorant of our laws and customs, and his counsel was out of the city at the time of this first meeting. After some examination of the bankrupt, the hearing was adjourned to a later date. At the next meeting the counsel for the bankrupt was present, but he had only a few moments prior to the meeting returned to the city and had had no opportunity to consult with his client. At the second examination the bankrupt, under the advice of his counsel, declined to answer sundry questions put to him and claimed his constitutional privilege to refuse to criminate himself. The referee having ruled that the questions should be answered, and the bankrupt still declining to answer, the referee announced that he would certify the facts to this court in order that it might be determined whether or not the bankrupt was guilty of contempt, and for punishment, if such were determined to be the case. Later, but before the certificate of the referee had been prepared, the bankrupt by his counsel offered to answer the questions, and accompanied the offer with an explanation that his counsel—who had not had an opportunity to confer with the bankrupt, and had been of opinion that it would criminate him to answer the questions—now advised him that he could safely answer the questions.

Upon the coming in of the certificate of the referee, accompanied by a full short-hand report of the proceedings before him, I issued a rule requiring the bankrupt to appear and show cause why he should not be punished for contempt. On the day set the bankrupt appeared, filed his demurrer to the rule and his answer; and arguments of counsel were heard.

The rule, so far as now material, reads as follows:

"UNITED STATES v. M. GOLDSTEIN.

"*Whereas*, From the certificate of R. C. Blackford, referee in bankruptcy, dated June 17, 1904, and the transcript accompanying the same, it is made to appear that M. Goldstein, of Lynchburg, Virginia, is guilty of contempt in that he declined to answer sundry questions put to him during his examination before said referee after having been directed by said referee to answer the same; it is therefore ordered that said M. Goldstein do appear

personally before this court, at the United States court room in Lynchburg, on June 28, 1904, at 10 o'clock A. M., and show cause, if any he has, why he should not be punished for said contempt.

"It is further ordered that a copy hereof be served on said M. Goldstein. . . . ."

On the hearing the demurrer was not insisted on. But, if it had been, I am of the opinion that the rule is sufficient. It refers to the transcript of proceedings filed by the referee in the clerk's office and open to inspection. *"Id certum est, quod certum reddi potest."* By reference to the transcript the entire matter constituting the alleged contempt could have been found, set out *in extenso.*

The answer, disavowing any want of respect for the referee and any intent to commit a contempt, sets up in explanation the rather unusual situation in which the defendant's counsel was at the time of the examination; repeats the offer to now testify, and also insists that the refusal to testify, under the circumstances as they existed at the time of the second examination of the bankrupt, did not render the defendant guilty of contempt.

The case before us brings up some interesting questions:

(1) The offer to testify, made after the adjournment of the examination before the referee, would not, in my opinion, purge the contempt—if the defendant were guilty of contempt in his refusal to answer. On the other hand, the subsequent offer to testify is an admission that the defendant could have answered the questions without danger to himself. In this case, however, because of the ignorance of our laws on the part of the defendant, and the ignorance by his counsel at the time of the facts, I think it proper to consider the questions involved as if there had been no subsequent offer to testify.

(2) The fact that the defendant in refusing to testify acted under the advice of counsel certainly palliates the offence—if it were such—but it does not excuse it. (4 Encyc. Pl and Pr. 792 and authorities there cited.)

(3) It is argued that the bankrupt act prevents a bankrupt from claiming the constitutional privilege Sec. 7, cl. 9, of the bankrupt act concludes: "But no *testimony* given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding." While it may be conceded that this clause would prevent the bankrupt's testimony from being given in evidence against him in a criminal proceeding either in a federal or a state court, still it

does not go far enough to afford him complete immunity. Except that this clause applies, as I think, to prosecutions in state courts as well as in federal courts, it is not even as broad as section 860 of U. S. Rev. Stats. And that statute, in *Counselman* v. *Hitchcock*. 142 U. S. 547, was held not to afford complete immunity and not to deprive a witness of his right to refuse to give testimony which might be used indirectly to his prejudice in a subsequent criminal prosecution. In that case it is said:

"It remains to consider whether sec. 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. It follows, that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture. This, of course, protected him against the use of his testimony against him or his property in any prosecution against him or his property, in any criminal proceeding, in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which should be attributable directly to the testimony he might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted."

To the same effect see *Cullen* v. *Commonwealth,* 24 Gratt. 624, one of the numerous cases cited in the *Counselman Case.* In that case Dr. Cullen was called before the grand jury and directed to testify concerning a duel between McCarty and Mordecai. He claimed his privilege, and declined to answer. After being called before the judge of the hustings court the witness was by the judge directed to testify, and, as he declined, he was sentenced to be fined and imprisoned for contempt. The court of appeals reversed the lower court. The state statute provided that every person connected with a duel could be compelled to testify, but that any *"statement* made by such person as such witness shall not be used against him in any prosecution against himself." In the opinion it is said:

"Whether such constitutional privilege can be taken away by the legislature at all, on any terms of indemnity, is a question not necessary to be now decided. But we are all clearly of opinion that before it can be taken away there must be absolute indemnity provided, and that nothing short of complete amnesty to the witness—an absolute wiping out of the offence as to him, so that he can no longer be prosecuted for it—will furnish that indemnity. We do not think the act of assembly referred to furnishes such indemnity. It only provides that the *'statement'* made by the witness shall not be used against him in a prosecution against himself. Now, it is apparent that, without using one word of that statement, the attorney for the commonwealth might in many cases, and in a case like the present inevitably would, be led by the testimony of the witness to means and sources of information which might result in criminating himself. This would be to deprive him of his privilege without indemnity.

"We are of the opinion, therefore, that the act of assembly aforesaid, failing to afford complete indemnity, does not deprive the plaintiff in error of his constitutional privilege."

Certainly the foregoing authorities are sufficient to enable us to say with absolute certainty that the immunity given by sec. 7, cl. 9 of the act, is not sufficient to deprive a bankrupt of his constitutional privilege. It is true that a bankruptcy proceeding is not a criminal case. But the constitutional exemption is a delusion and a snare if a man can be required to criminate himself merely because it is a civil case in which he is called on to testify.

(4) In deciding whether or not there was a contempt, I think the test is: Might an answer to the question have a tendency to criminate the witness? When a trial judge rules that a question is to be answered, and imposes punishment for a refusal to answer it, the appellate court on appeal uses this test. *Cullen* v. *Com.*, 24 Gratt. 624; *Temple* v. *Com.*, 75 Va. 892.

The act, sec. 29*b*, cls. 1 and 2, reads:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently

(1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or

(2) made a false oath or account in, or in relation to, any proceeding in bankruptcy."

It is true that clause 1 applies to concealing property from the *trustee*, and that in the case at bar the alleged concealment was prior to the appointment of the trustee. But when a person files his voluntary petition in bankruptcy he knows that a trustee will

be appointed and that such trustee takes title as of the date of the adjudiation. It follows that a concealment of property after the adjudication, even if before the appointment of the trustee, is a concealment from the trustee.

I have carefully examined and considered the questions which the bankrupt refused to answer. Counsel propounding these questions undoubtedly believed that in answering them truthfully the bankrupt would reveal that he had either concealed his property or had knowingly omitted several valuable articles from the schedules of his property. Beyond question his answers might have tended to show that he had committed one or both of these offenses. It follows that the bankrupt had a right to decline to answer the questions and can not be held in contempt for refusing so to do, unless because of the following contention:

(5) It is suggested that one who files a voluntary petition in bankruptcy, who in theory, at least, knows that he may be required to make full disclosures under section 7, cl. 9 of the bankruptcy act, is in the position of a defendant in a criminal case who voluntarily takes the witness stand in his own behalf; and that, having waived his constitutional privilege in respect to self-crimination, he can not refuse to answer any question. For the sake of argument it may be conceded—though I have not referred to, and have not found, any Virginia decision so holding—that when a defendant in a criminal cause voluntarily goes on the stand and testifies in his own behalf, he can not, on cross-examination, claim his privilege and refuse to answer. And while there is some likeness between the two cases, the analogy is not perfect. It seems to me that the position of the bankrupt is rather more like that of a defendant in a criminal case, who has *proposed* to testify in his own behalf and who, before so doing, concludes to claim his constitutional privilege.

Where the question is such that it is obvious that the refusal to answer is on the ground that the answer would tend to show that the bankrupt has committed one or both of the offenses set out in sec. 29b of the act, it seems to me that the refusal to testify carries with it a sufficient penalty, without invoking the doubtful doctrine of waiver and insisting on a punishment as for contempt. The discharge in bankruptcy is the ultimate benefit sought by the voluntary bankrupt. If he has committed either of the above-mentioned offenses he will be denied a discharge. A refusal to answer on the

ground above stated is an admission that such offense has been committed.

In a case such as we have here, therefore, I am of opinion that filing the petition is not a final and irrevocable waiver of the constitutional privilege.

In a case where the refusal is on the ground that to answer would tend to show that the bankrupt had committed some crime or offense other than the offenses created by the bankrupt act, the question is a nicer one. But as it does not arise here, I shall not discuss it.

(6) The case here is somewhat complicated by the subsequent offer to testify. But under the unusual circumstances here, I think it proper to act on the theory that the bankrupt at the time of the refusal in good faith believed that his answers to the questions would criminate him. As the questions were such that answers thereto might have a tendency to show the bankrupt guilty of the offenses specified in 29*b* of the act, I must conclude that he is not guilty of contempt.

The rule will be discharged.

NOTE.—The main point decided in this case was that where a person is under examination before a referee in bankruptcy, he is not obliged to answer questions when it appears that his answers might tend to criminate him. This point has come before the Supreme Court of the United States several times, and the decision has been the same as in the case at bar.

The fifth amendment of the constitution of the United States, which declares that "no person . . . shall be compelled in any criminal case to be a witness against himself," and sec. 8 of the constitution of Virginia to the same effect, are not confined to a *criminal case* against a party, but the object of these provisions is to insure that one shall not be compelled, when acting as a witness in *any proceeding*, to give testimony which might tend to show that he had committed a crime. *Counselman* v. *Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195; *Cullen* v. *Com.*, 24 Gratt. 624. Before this constitutional privilege can be taken away by the legislature, there must be absolute indemnity provided; and nothing short of complete amnesty as to the witness, a complete wiping out of the offence as to him so that he can no longer be prosecuted for it, will furnish that indemnity. Id. And the reasonable construction is that the witness is protected from being compelled to disclose "the circumstances of his offence, the sources from which, or the means by which, evidence of the commission, or of his connection with it, may be obtained or made effectual for his connection, without using his answers as direct evidence." *Emery's Case*, 107 Mass. 172, 182; *Counselman* v. *Hitchcock*, 142 U. S. 585.

And the legislature cannot abridge this constitutional privilege, nor can

it replace or supply one, unless the legislation is so broad as to have the same extent in scope and effect. And a statute that leaves the witness subject to prosecution after he answers the criminating questions put to him cannot have the effect of supplanting the privilege conferred by the constitution. *Counselman* v. *Hitchcock*, 142 U. S. 585; *Brown* v. *Walker*, 161 U. S. 591. Therefore, sec. 7, cl. 9, of the bankrupt law, providing that "no testimony given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding," does not afford the bankrupt complete protection against prosecution, and does not deprive him of the benefit of the constitutional privilege. *In Re Scott*, 95 Fed. 815; *In Re Rosser*, 96 Fed. 305; *In Re Feldstein*, 103 Fed. 271.

A question that arises under sec. 7, cl. 9, of the bankrupt law, prohibiting the use of the bankrupt's testimony against him "in any criminal proceeding," is whether this applies to a prosecution in a state court for an offence punishable under the state laws, as well as under the laws of the United States; *e. g.*, perjury in making a false oath to a schedule. The first point to be considered is as to the power of Congress, under the authority given it by the constitution to enact uniform bankrupt laws, to legislate as to the right of a *state* to introduce evidence in her own behalf, in her own courts, on a prosecution of an offence, which violates both federal and state laws. This power is distinctly asserted in *Brown* v. *Walker*, 161 U. S. 591, 607, where it is shown that while the constitution of the United States does not operate upon a witness testifying in the state courts, there is no such restriction upon the application of the federal statutes. The next point is as to whether the provision that the bankrupt's testimony "shall not be offered in evidence against him in any criminal proceeding" is broad enough to cover proceedings in both state and federal courts. In *Brown* v. *Walker*, *supra*, an act of Congress, requiring persons to testify before the Interstate Commerce Commission, and providing that no person should be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing to which he might testify, it was held that the immunity was intended to be general and applicable in whatever court such prosecution might be had. It is true, the court intimated that if the act had provided that no person should be prosecuted for or on account of any *crime* concerning which he might testify, the immunity might possibly be held to apply only to crimes under the federal laws, and not to crimes which are cognizable under state laws also. But it is submitted that the clause in the bankruptcy law referred to is as broad, so far as its jurisdictional effect is concerned, as the provision in the act referred to in *Brown* v. *Walker*.

As to the point in the fifth head-note, it is the rule that if the answer would inevitably, from its very nature, tend to incriminate the witness, he is the sole judge, and may refuse to answer the question; otherwise, the court must be the exclusive judge of whether such an answer is possible. 7 Am. & Eng. Enc. Law (2d ed.) 49; *U. S.* v. *Burr*, 25 Fed. Cas. No. 14692e.

C. B. G.